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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1958

No. 966

STATE OF NEW MEXICO, Petitioner

vs.

NELSON H. BEGAY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

FRED M. STANDLEY,
Attorney General of New Mexico
ROBERT F. PYATT,
Assistant Attorney General
ALFRED P. WHITTAKER,
Assistant Attorney General
Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, State of New Mexico, hereby petitions for a Writ of Certiorari to review the decision of the Supreme Court of New Mexico denying unto Petitioner the right and jurisdiction to enforce its laws pertaining to the use of state public highways within the exterior boundaries of that portion of the Navajo Indian

Reservation in New Mexico, in so far as Navajo Indians are concerned.

OPINIONS BELOW

The opinion below has not been officially reported, but is reported at 320 P. 2d 1017 (Advance Sheet No. 3). The opinion is appended hereto as Appendix A.

JURISDICTION

The order sought to be reviewed, affirming the judgment of the District Court of San Juan County, New Mexico, was dated January 22, 1958, and is appended hereto as Appendix B. On February 13, 1958, an order was entered denying Petitioner's Motion for Rehearing. The mandate was issued the same day. The statutory provision believed to confer jurisdiction upon this Court is 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Navajo Indian, by virtue of his race or status, is immune from prosecution in the Courts of New Mexico for such offenses as driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated, committed by him while using a state highway within the exterior boundaries of the Navajo Reservation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of New Mexico, Article XXI, § 2:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying

within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe."

Enabling Act for New Mexico, § 2, Second Provision, (36 Stat. 557, 558):

"Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or

from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

25 U.S.C.A. § 311 (31 Stat. 1084):

"The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not

been conveyed to the allottee with full power of alienation. (Mar. 3, 1901, c. 832, § 4, 31 Stat. 1084)"

18 U.S.C.A., § 1151 (62 Stat. 757; 63 Stat. 94):

"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757, amended May 24, 1949, c. 139, § 25, 63 Stat. 94."

STATEMENT OF THE CASE

Nelson H. Begay, a Navajo Indian, was arrested May 7, 1957, by an officer of the New Mexico State Police on Highway No. 666 in San Juan County, New Mexico, within the exterior boundaries of the Navajo reservation. Begay was charged with three violations of state law, namely: (1) driving while intoxicated; (2) driving after revocation of driver's license; and (3) being involved in an accident while driving when intoxicated. The charges were made before the Justice of the Peace, Precinct 13, County of San Juan, State of New Mexico. Trial was had and Begay was convicted. Incarceration in the county jail followed.

Begay filed his Petition for Writ of Habeas Corpus in the District Court of San Juan County, (R. 2), (which

refers to the typewritten Transcript of Record prepared and certified to by the Clerk of the Supreme Court of New Mexico, filed herewith, and to which reference is hereafter made herein), alleging under the circumstances reviewed above that all state courts lacked jurisdiction over the subject matter of the aforesaid three offenses; that instead, jurisdiction over said offenses was vested in the courts of the United States, or those of the Navajo Tribe; and that as a result, the judgment of the Justice of the Peace was a nullity and without jurisdiction. The federal question was thus initially presented.

The District Court of San Juan County issued its Writ of Habeas Corpus, directed to the Sheriff. Return thereto was duly made. After hearing, the Court issued its order (R. 9) finding that the aforesaid Justice of the Peace had no jurisdiction to try and convict Begay of the crimes charged; that Begay was thus deprived of liberty without due process of law; and was ordered released from custody and restored to liberty.

A Stipulation was entered into and introduced into evidence (R. 18). This disclosed the location of Highway 666 through the Navajo Reservation, and also Interior Department approval thereof.

The State of New Mexico challenged the ruling on the jurisdiction of its courts, and perfected its appeal to the Supreme Court of New Mexico. The appeal was solely on jurisdictional grounds, as is revealed by New Mexico's sole point relied upon for reversal (R. 21). The federal question was in this manner presented to the Supreme Court of New Mexico. The judgment of the Supreme Court of New Mexico, reviewed above, followed in due course.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. That the Supreme Court of New Mexico has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States.

2. That said Federal question should be settled by the Supreme Court of the United States.

POINT I

THE GRANT BY THE SECRETARY OF THE INTERIOR OF A HIGHWAY EASEMENT, PURSUANT TO 25 U.S.C.A. § 311, CONFERS JURISDICTION UPON THE COURTS OF THE GRANTEE STATE TO ENTERTAIN PROSECUTIONS FOR HIGHWAY VIOLATIONS.

The opinion of the Supreme Court of New Mexico interpreted 25 U.S.C.A. § 311, and the grant pursuant thereto of an easement to construct Highway 666 through the Navajo reservation, as having failed to extinguish the title of the Navajo Tribe of Indians. We are not unmindful that 18 U.S.C.A. § 1151 employs the language:

> ". . . including rights-of-way running through the reservation . . ."

But for reasons hereinafter developed, we do not believe the latter language negates Petitioner's position.

While the opinion below does not expressly so hold, it is clear from a perusal thereof that the denial of jurisdiction over Begay, under the circumstances here presented, was founded solely upon Begay's race. Based upon what we submit is erroneous interpretation of federal law, the decision of the Supreme Court of New Mexico accords a

privileged position to many of New Mexico's citizens solely because of race.

It would do violence to the rules of this Court to cite and expound upon the plethora of cases requiring the several states to accord racial equality. And this is nowhere more certain and settled than in the field of law enforcement. Yet what has the Supreme Court of New Mexico done? It has placed the Navajo citizens of this State upon a pedestal above the law. In the confines of the Navajo reservation, those citizens may engage in drunken driving and other highway offenses with impunity. They may violate, with defiance, laws enacted for their protection, when under exact circumstances, the English-speaking and Spanish-speaking citizens of New Mexico would be subject to severe penalties.

With this state of affairs in mind, can it be gainsaid that the Supreme Court of New Mexico has not decided a federal question of substance under 25 U.S.C.A. § 311? It has not been heretofore determined by this Court.

The Supreme Court of New Mexico held that Congress has absolute jurisdiction over Indian lands in New Mexico, until the Indian title is extinguished, citing Constitution of New Mexico, Article XXI, § 2. And further that the highway easement at bar had not served to extinguish said title. But it is always to be emphasized that said section of the New Mexico Constitution, and § 2 of the Enabling Act, provide in part:

> " . . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . "

True, such provisions prevent *unauthorized* encroachment

by Petitioner upon Indian lands. But no such encroachment has at any time been sought. Our position is that Congress *has authorized*, by 25 U.S.C.A. §311, an extinguishment of title, to the extent an easement accomplishes such. Hence, the easement upon which Highway 666 is located is no longer under absolute Congressional jurisdiction. Neither the Constitution of New Mexico nor the Enabling Act prevent Petitioner's claim of jurisdiction which is consistent in all respects with the federal grant authorized by Congress.

It is most important that it be kept in mind when Petitioner acquired her easement through the Navajo reservation. The approval was granted April 29, 1926. (R. 18). It is true that 18 U.S.C.A. § 1151 refers to rights of way, as quoted supra, which language, however, was added by amendment of June 28, 1932. Hence, Petitioner's rights were acquired almost seven years prior to the amendment, but Congress, in the enactment thereof, made no mention of existing rights of way owned by the several states. In the absence of an expression of congressional intent to disturb Petitioner's vested right, it is hardly to be inferred that such was intended. Accordingly, the definition of Indian country, set forth by 18 U.S.C.A. § 1151, insofar as the rights of way language is concerned, can have no bearing on this case. In addition, it is to be observed that in order for *any* area to be "Indian country" under the statute, it must in any event be territory ". . . under the jurisdiction of the United States government, . . ." Viewed in proper perspective with our above argument that both the Enabling Act and Constitution of New Mexico contemplate that Congress may authorize a divestiture of Indian title, and hence federal jurisdiction, 28 U.S.C.A. § 1151 becomes of little significance once an easement was granted pursuant to 25 U.S.C.A. § 311. In brief, the easement dis-

placed the Indian title, and to that extent the previously existing federal jurisdiction, so that New Mexico may enforce its laws designed for the protection of the traveling public.

To view the matter otherwise is to make a mockery of the right of way grant to Petitioner. By necessary implication, said grant carried the right to enforce laws necessary to protect travelers on the highway, and indeed, the highway itself. For this Court to permit the decision of the Supreme Court of New Mexico to stand would be to attribute to Congress, and the Secretary of the Interior, not only a useless act, but an invitation to wholesale lawlessness on state highways running through Indian reservations.

While research has not disclosed that this Court has passed upon this exact issue, we submit the case is controlled in principle by *United States v. Oklahoma Gas and Electric Co.*, 318 U.S. 206, 63 S. Ct. 534. The question for determination was whether the grant of permission to the State of Oklahoma to establish a highway over allotted Indian lands given under 25 U.S.C.A. § 311, included the right of Oklahoma, in turn, to permit maintenance of electric lines within the highway right of way. The Secretary of the Interior approved the grant on January 20, 1928. The United States brought suit against the utility seeking declaratory relief. The district court dismissed the complaint, and the circuit court of appeals affirmed. Because of the importance of the question to the administration of Indian affairs, certiorari was granted. If we may digress from the case momentarily, it seems to us the instant case involves a question equally, if not more, " . . . important to the administration of Indian affairs . . . ", and certainly should be finally determined by this Court. In the opinion, considerable stress was laid upon the language: " . . . in

accordance with the laws of the State or Territory in which the lands are situated . . . ", and it was held that there was no reason to believe Congress intended to grant to Oklahoma a *limited power* in a matter so commonly subject to local control. This we submit is the exact argument now propounded by Petitioner. Can it logically be said that Congress and the Secretary of the Interior in granting New Mexico the right to construct Highway No. 666 across the Navajo reservation, intended a grant of *limited power* in a matter so commonly subject to local control as the enforcement of laws relating to proper use of highways? Yet the decision by the Supreme Court of New Mexico denies even limited power insofar as Begay is concerned. Then this Court held that the explicit reference in the Act to state law indicated the answer to the issue *was to be found in the state law*. And so here, New Mexico's law relating to the offenses of which Begay was convicted are broad and general in scope. We state unequivocally that said laws contain no exceptions founded upon race, and no exceptions of Indian reservations. Very interesting is the Court's continued reasoning that under its construction of the statute, Indians were subjected to the same rule of law as others in Oklahoma. Again applying the Court's reasoning to Petitioner's case, under the position urged by us, Indians will be subjected to the same rule of law as others, and the ugly spectre of racial favoritism will vanish. Then the Court delved into the practicalities of the situation, pointing out how large areas in Oklahoma were held in trust for allottees, and that complications and confusion would follow if different rules were applied to highways crossing Indian lands. Yet this reasoning is also most apropos in the instant case. We respectfully request the Court to take judicial notice of what is realized by all—that large areas of New Mexico consist of Indian reservations, many of which are traversed by arterial high-

ways of national importance. Different rules in these areas, as to enforcement of criminal laws applicable to the use of highways, would not only place an intolerable burden upon Petitioner, inconsistent with its status as a sovereign state, but would grossly jeopardize the lives and limbs of all highway users, Indians as well as others. Interestingly, 18 U.S.C.A. § 1151 was not even mentioned.

In three instances, other than this Cause, has this matter been litigated. We shall review the cases but briefly—to do otherwise would unduly extend this Petition.

In *State v. Tucker*, 237 Wis. 310, 296 N.W. 645, a highway right of way had been granted by the Secretary of the Interior to Wisconsin to construct a highway through an Indian reservation. Defendant was a tribal Indian, living on the Menominee reservation. The question was whether Wisconsin could require him to register his truck and pay a fee for its operation on a state highway within the exterior boundaries of the reservation. In affirming the conviction, the Supreme Court of Wisconsin held that the grant pursuant to 25 U.S.C.A. § 311 carried by necessary implication the right to police the road, and the fact that it was a public highway implied that no person, Indian or white, could use it except on the same conditions as the general public.

On the other hand, *In re Fredenberg*, 65 F. Supp. 4, held contra to the *Tucker* case, devoting a large portion of its opinion to a criticism of the *Tucker* decision.

The case of *Konaha v. Brown*, 131 F. 2d 737, involved the question of whether a Tribal Indian could be prosecuted in state court for negligent homicide, for killing another Indian on a state highway within the exterior boundaries of the Indian's reservation. The nature of the crime (a felony), appeared to be of paramount importance, since

the *Tucker* case was distinguished on the grounds it involved a motor vehicle offense, while in the *Konaha* case the crime of manslaughter was the offense. On this basis, the court in *Konaha* said the crime was under the Ten Major Crimes Act (See 18 U.S.C.A. § 1153, not here involved), and hence only the federal courts had jurisdiction. We agree. At any rate, the *Konaha* opinion contains language which, while perhaps dicta, is favorable to Petitioner, since it was said that the right to maintain a highway carried by implication the right in the state to enforce penal provisions serving to protect the highway, such as speeding and impairing the highway. Begay was convicted of three offenses heretofore recited. How can it be said, consistent with reason, that these three offenses were not of the very class or nature said by *Konaha* to be matters for state jurisdiction and enforcement?

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

FRED M. STANDLEY,
Attorney General of New Mexico,
ROBERT F. PYATT,
Assistant Attorney General,
ALFRED P. WHITTAKER,
Assistant Attorney General,
Attorneys for Petitioner.

Appendix "A"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellant,

vs.

NELSON H. BEGAY,
Defendant-Appellee.

No. 6292

[Filed January 22, 1958.]

Appeal from the District Court of San Juan County, McCulloh, Judge

Fred M. Standley, Atty. Gen., Frank H. Patton, Special Asst. Atty. Gen., Robert F. Pyatt, Asst. Atty. Gen., Santa Fe, New Mexico, Attorneys for Appellant.

Tansey & Rosebrough, Farmington, New Mexico, Attorneys for Appellee.

OPINION

KIKER, Justice.

The appellee, Nelson H. Begay, is a Navajo Indian who was arrested on May 7, 1957, by an officer of the New Mexico State Police on the right of way of U. S. Highway 666, south of Shiprock, New Mexico, and within the exterior boundaries of the Navajo Reservation. He was taken to the office of the justice of the peace for Precinct No. 13, County of San Juan, State of New Mexico, and charged

with three violations of state law, to-wit: driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated.

Appellee was tried and convicted of the charges in the justice of the peace court and interned in the county jail. On May 27, 1957, appellee filed his petition for writ of habeas corpus in the district court of San Juan County and prayed for his release from imprisonment. Appellee in his petition challenged the jurisdiction of the state courts over the subject matter and contended that the judgment of the justice of the peace was a nullity.

The district judge issued the writ of habeas corpus directed to the sheriff directing that the body of the appellee be produced at the court house at Aztec, New Mexico, for hearing. At the hearing the court held that the justice of the peace was without authority or right to impose the sentence on the appellee and that he had been deprived of his liberty without due process of law. The court ordered appellee be released and restored to his liberty. Appeal was taken from such order and judgment of the district court.

Highway 666 was constructed under a grant from the United States to the State of New Mexico of an easement to the land for the right of way under discussion herein. A map was introduced in evidence at the hearing on the Petition for Writ of habeas corpus which describes this particular highway and upon which the right of way is delineated. This map bears a notation of approval of the Department of the Interior of the United States which reads, as follows:

> "Department of the Interior, April 29, 1926, approved as of date of December 23, 1925, subject to the pro-

vision of the Act of March 3, 1901 (31 Stat. L. 1058. 1084) Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

/2/ William H. Edwards
William H. Edwards
Assistant Secretary."

The Department regulation cited in the approval is Title 25 U.S.C.A. 311, reading:

"The Secretary of the Interior is authorized to grant permission, upon the compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been alloted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation. (Mar. 3, 1901, c. 832, Sec. 4, 31 Stat. 1084)."

The approval granted by the Department of the Interior to the state to construct Highway 666 was subject to the provisions of 25 U.S.C.A. 311 which authorizes the Secretary of the Interior " * * * to grant permission * * * for the opening and establishment of public highways * * *." Nothing more than an easement granted to the state can be found here. An easement is distinguished from a fee and constitutes a liberty, privilege, right or advantage which one has in the land of another. 28 C.J.S. 619, 623.

The State of New Mexico lacks jurisdiction over Indian lands within the state until and unless the title of the Indian or Indian Tribes shall have been extinguished. Until such extinguishment of title, the lands involved are sub-

ject to the absolute jurisdiction and control of the Congress of the United States. Constitution of New Mexico, Art. XXI, Sec. 2. We hold that the authority under which the State was permitted to construct Highway 666 through, and over, the Navajo Indian reservation failed to extinguish the title of the Navajo Indian Tribe.

The appellant relies heavily upon the case of State v. Tucker, 237 Wis. 310, 296 N. W. 645. That case also involved a highway right of way through an Indian reservation granted to the State by the Department of the Interior. The court held that the permission given to construct and maintain the highway by the Secretary of the Interior under 25 U.S.C.A. 311 destroyed the Indian's title to the land included in the highway right of way. Thus, with the title in the Indians extinguished, the land came under the jurisdiction of the state. State v. Tucker, adopted a rule of law which was taken from the earlier cases of Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681; Veeder v. Guppy, 3 Wis. 502; Beecher v. Wetherby, 95 U.S. 517, 24 L. ed. 440. Generally, these cases hold that the title of the Indians was a right of occupancy, a possessory right, and not a fee. In State v. Tucker the court went further and said that when the United States granted permissive use to the State it had the effect of extinguishing the title in the Indians and, therefore, the land in question came under the jurisdiction and control of the State.

In the case of Ex parte Konaha, 43 F. Supp. 747, a Menominee Indian was charged with negligent homicide as a result of driving his automobile while under the influence of alcoholic beverages and causing the death of another Indian of the Tribe. The incident upon which the charge was based took place on a portion of State Highway 47 in Wisconsin which is located entirely within the boundary of the Menominee Indian Reservation. Upon his

conviction, Konaha filed an application for writ of habeas corpus. The court considered the decision in State v. Tucker and found that decision to be unsound and considered it not binding.

State Highway 47 was again involved in the case of In re Fredenberg, 65 F. Supp. 4. There, a Menominee Indian was convicted of violating a state statute which prohibited the operation of an unregistered motor vehicle on a state highway. Upon application for a writ of habeas corpus, the petitioner contended, much the same as the appellee argues in the instant case, that since the alleged offense occurred upon that portion of the highway which was constructed upon the Indian reservation by the state with the permission of the federal government under authority of 25 U.S.C.A. 311, the state was without jurisdiction. The court specifically stated at page 5 that State v. Tucker was decided wrong and continued at page 6 to say:

> "I believe it is now firmly established that the Indian title is equivalent to beneficial ownership and I believe that the granting of an easement for the purpose of constructing and maintaining a highway did not extinguish the Indians' underlying title. By the establishment of the highway the existing relationship of the Indians to the State was not altered. The easement which the State has to construct and maintain the highway is limited in character. The State accepted the easement on that limited basis.
>
> "* * * There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the State primarily for its own convenience to establish a State highway across the reservation."

In re Fredenberg presents the same problem that we

have before us here. In the instant case when the federal government permitted the State to construct a highway across the Indian reservation it did not extinguish beneficial title in the Indians. Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.

The appellant cites much authority in an attempt to sustain its contention that the State did have jurisdiction in this matter. In re Fredenberg deals, however, with this very same problem. The facts in that case are the same as we have here with only the state statute violated being different. We feel that we must be guided by so similar a case, so carefully thought out. The judgment of the lower court should be affirmed.

IT IS SO ORDERED.

/s/ H. A. Kiker, Justice.

WE CONCUR:

/s/ Eugene D. Lujan, C. J.

/s/ James B. McGhee, J.

/s/ J. C. Compton, J.

Sadler, J., not participating.

Appendix "B"

ORDER AFFIRMING JUDGMENT

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises announces its decision by Mr. Justice Kiker, Chief Justice Lujan, Mr. Justice McGhee and Mr. Justice Compton concurring, Mr. Justice Sadler not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file:

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of San Juan, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of San Juan County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.